

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

JESSICA FLETCHER,

Plaintiff,

CASE NO. C15-5353-RAJ-MAT

V.

CAROLYN W. COLVIN, Acting
Commissioner of Social Security.

Defendant.

REPORT AND RECOMMENDATION RE: SOCIAL SECURITY DISABILITY APPEAL

Plaintiff Jessica Fletcher proceeds through counsel in her appeal of a final decision of the Commissioner of the Social Security Administration (Commissioner). The Commissioner denied Plaintiff's applications for Disability Insurance Benefits (DIB) and Supplemental Security Income (SSI) after a hearing before an Administrative Law Judge (ALJ). Having considered the ALJ's decision, the administrative record (AR), and all memoranda of record, the Court recommends that this matter be REVERSED and REMANDED for further administrative proceedings.

FACTS AND PROCEDURAL HISTORY

¹ Plaintiff was born on XXXX, 1975. She graduated from high school and attended

¹ Plaintiff's date of birth is redacted back to the year of birth in accordance with Federal Rule of Civil Procedure 5.2(a) and the General Order of the Court regarding Public Access to Electronic Case

1 college for one year, and previously worked as a cashier, customer sales representative, machine
2 operator, office worker, and residential rehabilitation counselor. (AR 241, 253.)

3 Plaintiff protectively applied for DIB and SSI on July 28, 2011, alleging disability
4 beginning November 30, 2006.² (AR 200-08, 237.) Her applications were denied at the initial
5 level and on reconsideration, and she timely requested a hearing. (AR 132-40, 143-56.)

6 On April 3, 2013, ALJ Scott R. Morris held a hearing, taking testimony from Plaintiff
7 and a vocational expert (VE). (AR 40-86.) On July 24, 2013, the ALJ issued a decision finding
8 Plaintiff not disabled. (AR 19-32.)

9 Plaintiff timely appealed. The Appeals Council denied Plaintiff's request for review on
10 March 23, 2015 (AR 4-9), making the ALJ's decision the final decision of the Commissioner.
11 Plaintiff appealed this final decision of the Commissioner to this Court.

12 **JURISDICTION**

13 The Court has jurisdiction to review the ALJ's decision pursuant to 42 U.S.C. § 405(g).

14 **DISCUSSION**

15 The Commissioner follows a five-step sequential evaluation process for determining
16 whether a claimant is disabled. *See* 20 C.F.R. §§ 404.1520, 416.920 (2000). At step one, it must
17 be determined whether the claimant is gainfully employed. The ALJ found Plaintiff had not
18 worked after the alleged onset date. (AR 21.) At step two, it must be determined whether a
19 claimant suffers from a severe impairment. The ALJ found severe Plaintiff's obesity,
20 degenerative disk disease, bilateral lower extremity neuropathy, diabetes mellitus, asthma, and
21 gastroparesis. (AR 21-23.) Step three asks whether a claimant's impairments meet or equal a

22 Files, pursuant to the official policy on privacy adopted by the Judicial Conference of the United States.
23

² At the administrative hearing, Plaintiff amended her onset date to March 1, 2010. (AR 48.)

1 listed impairment. The ALJ found that Plaintiff's impairments did not meet or equal the criteria
2 of a listed impairment. (AR 23-24.)

3 If a claimant's impairments do not meet or equal a listing, the Commissioner must assess
4 residual functional capacity (RFC) and determine at step four whether the claimant demonstrated
5 an inability to perform past relevant work. The ALJ found Plaintiff able to perform light work as
6 defined in 20 C.F.R. §§ 404.1567(b) and 416.967(b), with additional limitations: she can stand
7 and/or walk a total of two hours in an eight-hour workday. She cannot climb ladders, ropes, or
8 scaffolds. She can frequently climb ramps and stairs. She can occasionally balance, stoop,
9 kneel, crouch, and crawl. She must avoid concentrated exposure to extreme heat, humidity, and
10 hazards. She must avoid even moderate exposure to extreme cold and industrial-strength fumes,
11 odors, dusts, gases, or other pulmonary irritants. (AR 24-27.) With that assessment, the ALJ
12 found Plaintiff capable of performing her past relevant work as a customer service representative
13 and data entry clerk. (AR 28.)

14 The ALJ also proceeded in the alternative to step five of the sequential evaluation, where
15 the burden shifts to the Commissioner to demonstrate that the claimant retains the capacity to
16 make an adjustment to work that exists in significant levels in the national economy. With the
17 assistance of a VE, the ALJ found Plaintiff capable of performing other jobs, such as agricultural
18 sorter, mail clerk, and cashier II. (AR 28-29.)

19 This Court's review of the ALJ's decision is limited to whether the decision is in
20 accordance with the law and the findings supported by substantial evidence in the record as a
21 whole. *See Penny v. Sullivan*, 2 F.3d 953, 956 (9th Cir. 1993). Substantial evidence means more
22 than a scintilla, but less than a preponderance; it means such relevant evidence as a reasonable
23 mind might accept as adequate to support a conclusion. *Magallanes v. Bowen*, 881 F.2d 747,

1 750 (9th Cir. 1989). If there is more than one rational interpretation, one of which supports the
2 ALJ's decision, the Court must uphold that decision. *Thomas v. Barnhart*, 278 F.3d 947, 954
3 (9th Cir. 2002).

4 Plaintiff argues the ALJ erred in (1) finding at step three that she did not meet a listing for
5 asthma, (2) discounting her credibility, and (3) assessing her RFC. She asks that the ALJ's
6 decision be reversed and her claim remanded for an award of benefits or, in the alternative, for
7 further proceedings. The Commissioner argues the ALJ's decision is supported by substantial
8 evidence and should be affirmed.

9 Step Three

10 Plaintiff argues that the ALJ erred in finding that her asthma did not meet or medically
11 equal Listing 3.03B. The ALJ found that although Plaintiff visited emergency departments on
12 multiple occasions due to asthma, these were not the type of hospital visits envisioned by the
13 listing, and her treatments there were not the type of interventions required to satisfy the listing.
14 (AR 24.)

15 Legal Standards

16 At step three of the sequential evaluation of disability, the ALJ considers whether one or
17 more of a claimant's impairments meets or equals an impairment listed in Appendix 1 to Subpart
18 P of the regulations. The Listing of Impairments (the "listings") describes specific impairments
19 of each of the major body systems "which are considered severe enough to prevent a person from
20 doing any gainful activity." *Tackett v. Apfel*, 180 F.3d 1094, 1099 (9th Cir. 1999) (quoting 20
21 C.F.R. § 404.1525 (1999)). If a claimant meets or equals a listing, the claimant is found disabled
22 without further inquiry. If not, the analysis proceeds to the next steps of the evaluation.

23 Each listing sets forth the "symptoms, signs, and laboratory findings" that must be

1 established in order for claimant's impairment to meet the listing. *Tackett*, 180 F.3d at 1099.
2 "For a claimant to show that his impairment matches a listing, it must meet *all* of the specified
3 medical criteria. An impairment that manifests only some of those criteria, no matter how
4 severely, does not qualify." *Sullivan v. Zebley*, 493 U.S. 521, 530 (1990). The claimant's
5 impairment must not only be one listed in Appendix 1, but must have the specific findings shown
6 in the listing for that impairment. *Marcia v. Sullivan*, 900 F.2d 172, 175 (9th Cir. 1990).

7 **Listing 3.03B**

8 Listing 3.03B addresses one way in which asthma can meet listing-level severity:

9 Attacks (as defined in [20 C.F.R. Pt. 404, Subpart P, App. 1, §] 3.00C), in spite of
10 prescribed treatment and requiring physician intervention, occurring at least once
every 2 months or at least six times a year. Each in-patient hospitalization for
11 longer than 24 hours for control of asthma counts as two attacks, and an
evaluation period of at least 12 consecutive months must be used to determine the
frequency of attacks.

12
13 20 C.F.R. Pt. 404, Subpt. P, App. 1, § 3.03B. The introductory text to Listing 3.00 defines
14 asthma attacks as:

15 prolonged symptomatic episodes lasting one or more days and requiring intensive
16 treatment, such as intravenous bronchodilator or antibiotic administration or
17 prolonged inhalational bronchodilator therapy in a hospital, emergency room or
equivalent setting. Hospital admissions are defined as inpatient hospitalizations
18 for longer than 24 hours. The medical evidence must also include information
documenting adherence to a prescribed regimen of treatment as well as a
description of physical signs. For asthma, the medical evidence should include
19 spirometric results obtained between attacks that document the presence of
baseline airflow obstruction.

20 20 C.F.R. Pt. 404, Subpt. P, App. 1, § 3.00C.

21 Plaintiff argues that her 27 visits to the hospital complaining of shortness of breath
22 between her alleged onset date and January 5, 2013, satisfy the frequency requirement of Listing
23 3.03B. Dkt. 14 at 4-7. She also notes that her hospital visits included treatment consistent with

1 Listing 3.00C. Dkt. 14 at 4-6. Thus, Plaintiff argues that she meets Listing 3.03B.³

2 The Commissioner does not dispute that the frequency of Plaintiff's hospital visits could
 3 satisfy Listing 3.03B, but argues that the type of treatment Plaintiff received there "did not rise to
 4 the level contemplated by Listing 3.00." Dkt. 15 at 13. Even according to Plaintiff's summary
 5 of the evidence (Dkt. 14 at 4-6), only some of the hospital treatment notes reference
 6 administration⁴ of antibiotics and bronchodilators (*see, e.g.*, AR 547, 575, 678, 690, 737, 767,
 7 776, 1382), and it is not clear whether the bronchodilators administered would be considered the
 8 type of "prolonged inhalational bronchodilator therapy" contemplated in Listing 3.00C.

9 The ALJ did not, however, explain how he reached the conclusion that that Plaintiff's ER
 10 visits and treatments there would not satisfy Listing 3.00C; he merely conclusorily stated this
 11 finding. (AR 24 n.1.) In the absence of specific ALJ findings on the issue, the Court will not
 12 supply the ALJ's rationale. *See Bray v. Comm'r of Social Sec. Admin.*, 554 F.3d 1219, 1225-26
 13 (9th Cir. 2009) (court reviews ALJ's decision "based on the reasoning and factual findings
 14 offered by the ALJ -- not post hoc rationalizations that attempt to intuit what the adjudicator may
 15 have been thinking"). Evidence related to Plaintiff's continued smoking may also impact the
 16 applicability of Listing 3.03B, but the ALJ did not address this factor in relation to step three.

17 The Court finds that the conflicting evidence with regard to whether Plaintiff meets

18 ³ Plaintiff also argues that her asthma in combination with hyperglycemia caused by her diabetes
 19 medically equal Listing 3.03B. Dkt. 16 at 3. She cites no medical opinion evidence to support this
 20 argument. She also posits, without medical support, that her pulmonary embolism, although "certainly []
 21 not really asthma," would combine with her asthma attacks to equal Listing 3.03B in 2010. (AR 70-71,
 22 293.) Plaintiff has failed to present a plausible theory of equivalence, based on legally sufficient medical
 23 evidence. *See Lewis v. Apfel*, 236 F.3d 503, 514 (9th Cir. 2001) ("A finding of equivalence must be based
 on medical evidence only. 20 C.F.R. 404.1529(d)(3).").

22 ⁴ For example, some of the treatment notes mention that Plaintiff received nebulizer from
 23 emergency medical staff prior to arrival at the hospital (AR 1295, 1406, 1423, 1703). On remand, the
 ALJ should address whether this type of treatment is distinguishable from the "prolonged" "therapy"
 contemplated in Listing 3.00C.

1 Listing 3.03B precludes a remand for a finding of disability. *See Treichler v. Comm'r of Social
2 Sec. Admin.*, 775 F.3d 1090, 1101 (9th Cir. 2014). On remand, the ALJ shall reconsider whether
3 Plaintiff meets Listing 3.03B and explain why she does or does not meet the necessary
4 requirements. The ALJ will also reconsider the credibility findings and RFC assessment as
5 necessary.

6 CONCLUSION

7 For the reasons set forth above, the Court recommends this matter should be REVERSED
8 and REMANDED for further administrative proceedings.

9 DEADLINE FOR OBJECTIONS

10 Objections to this Report and Recommendation, if any, should be filed with the Clerk and
11 served upon all parties to this suit within **fourteen (14) days** of the date on which this Report and
12 Recommendation is signed. Failure to file objections within the specified time may affect your
13 right to appeal. Objections should be noted for consideration on the District Judge's motions
14 calendar for the third Friday after they are filed. Responses to objections may be filed within
15 **fourteen (14) days** after service of objections. If no timely objections are filed, the matter will
16 be ready for consideration by the District Judge on **January 22, 2016**.

17 DATED this 7th day of January, 2016.

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19 
20 Mary Alice Theiler
United States Magistrate Judge
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